SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1971

No. 71-68

MAGGIE BAILEY, - - - - - - - - **Petitioner,**

versus

COMMISSIONER OF INTERNAL REVENUE, - - - - - - - - **Respondent.**

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY TO RESPONDENT'S MEMORANDUM

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1. IS THE INCOME TAX CIVIL FRAUD PENALTY A QUASI-CRIMINAL PENALTY?

The primary question for consideration by this Court is whether or not the income tax civil fraud penalty under the Internal Revenue Code is a quasi-criminal penalty?

In the Tax Court trial below, the petitioner was charged with fraudulent intent to evade taxes for the years 1942 through 1963. The resulting fraud penalties with which the respondent confronted the petitioner totalled $50,952.69 for the years 1942 through 1963 (R. 15a).[1]

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[1]The income taxes and other penalties faced by petitioner were $101,630.40 and $17,808.85, respectively, for the years 1942 through 1963 (R. 15a).

Congress has provided several penalties or sanctions, in the Internal Revenue Code, for the purpose of promoting the orderly and punctual administration of the Federal income tax system. The penalties include both civil and criminal sanctions. Invocation of the criminal does not exclude resort to the civil. *Helvering* v. *Mitchell,* 303 U. S. 391, 82 L. Ed. 917. The most severe of the civil sanctions is that for fraud which is an offense of a serious character, which Congress has designated by the term "fraud with intent to evade tax." The sanction imposed for this offense is that there is added to the tax an amount equal to 50 per cent of the total amount of the deficiency. In one respect the civil fraud penalty is much more severe than the criminal. There is no statute of limitations for civil fraud penalties and the income deficiencies, too, are kept open forever. Whereas, there is a six-year statute for criminal fraud.

With a set of tax fraud facts in his hands, the prosecutor (the Federal government) may choose the criminal penalty route, and if successful the civil penalty also falls on the taxpayer—or the prosecutor may forego the criminal, choose the civil penalty or sanction route to punish the wrongdoer and to warn others. The sole reason he chooses the civil and foregoes the criminal is his belief, from an appraisal of the evidence in hand, that his chances of success are less with the criminal than with the civil. For the main difference between the trial of a civil penalty and that of a criminal penalty is the burden of proof—and the difference there is indeed not too great. In civil, the

government must prove fraud by clear and convincing evidence whereas in criminal it is beyond a reasonable doubt.

The purpose, however, of both criminal and civil penalties is the same as revealed by this Court in the decision of *Dorsheimer* v. *U. S.*, 7 Wall. 1966:

> " 'The purpose of *penalties inflicted upon persons who attempt to defraud the revenue* is to enforce the collection of duties and taxes. They act *in terrorem* upon parties whose conscientious scruples are not sufficient to balance their hope of profit.' This definition applies to civil penalties . . . and criminal penalties." (Emphasis supplied.)

The dictionary describes *Quasi-Criminal* as all offenses not crimes or misdemeanors, but which are *in the nature of crimes;* a class of offenses against the public which have not been declared crimes, but *wrongs against the general or local public* which it is proper should be repressed or *punished by forfeitures and penalties.*

2. WAS NOT THE SEARCH WARRANT ILLEGAL WHEN ISSUED AND/OR LATER BECAME ILLEGAL AND VOID AS TO PETITIONER?

This Court stated, in the case of *Aguilar* v. *Texas*, 378 U. S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509, as follows:

> "Although an affidavit may be based on hearsay and need not reflect the direct personal observa-

> tions of the affiant . . . the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant whose identity need not be disclosed . . . was 'credible' or his information 'reliable' . . ."

The affidavit of Trooper Mayberry is void of any "underlying circumstances" from which the magistrate, the County Judge, could conclude that Charles Young was "credible" or his information "reliable" (R. 116a). The County Judge was not called as a witness to testify to the "underlying circumstances," if any, which he received from the informant or the affiant Trooper Mayberry. Too, the affiant Trooper Mayberry was not called as a witness in the Tax Court trial below, although from respondent's Memo (p. 3) it appears Trooper Mayberry did testify where respondent states:

> "Officer Mayberry, on whose affidavit (R. 116a) the warrant was issued, *stated* that his information came from Charles Young, . . ."

Trooper Cromer, the only one of the troopers to testify in the Tax Court, testified that he did not know Charles Young (R. 287a). And, Trooper Mayberry was not garrisoned in Harlan but in Richmond, Kentucky 130 miles away and was imported for the raid (R. 288a). Since he did not testify, the presumption is that he had no personal knowledge of the business operation of petitioner at the premises. Therefore, there were no

"underlying circumstances" revealed by the affidavit or the record. (See *U. S.* v. *Harris,* 91 S. Ct. 2075 (1971).)

Additionally, the testimony of Trooper Cromer disagreed with the affidavit of Trooper Mayberry, which affidavit stated that Charles Young bought the beverages. Trooper Cromer testified, and his official report to state headquarters stated that Trooper Roy Lindsey bought the beverages which resulted in the search warrant (R. 131a, 261a, 288a). Since respondent's claim is that Trooper Cromer's testimony is credible, then the affidavit on which the warrant was issued was clearly false and unreliable, and the County Judge was apparently deceived.

This Court advised in *United States* v. *Ventresca,* 380 U. S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741 that the magistrate should not be a rubber stamp for the police—

> "Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. * * *"

Therefore a question here for this Court—was not the search warrant issued without probable cause?

Further, the affidavit stated only that the alcoholic beverages were in violation of the Kentucky local option law and did not state that the alcoholic beverages were untaxed and therefore not in violation of any revenue laws (R. 116a). It is therefore presumed that all required taxes were paid by the reputable manu-

facturers of the "Budweiser Beer" and the "Old Haven Hill" whiskey. Now, an examination of the search warrant reveals that it did not authorize a search for alcoholic beverages in violation of the local option law but authorized a search for untaxed "alcoholic beverages" and "stills," obviously moonshine and moonshine stills (R. 114a). Therefore another question here is—where an affidavit is predicated on violation of state local option law and the search warrant is for violation of revenue laws, was there probable cause for the issuance of the search warrant?

Still further, the personal warrant for the petitioner reads, as follows:

> "You are commanded to *search the person of MAGGIE BAILEY* or the automobile or truck, or the house, the outbuildings and adjacent premises *now used by the accused MAGGIE BAILEY,* which is now located in Harlan County, Kentucky . . ." (Emphasis supplied.)

However, the affidavit for the warrant did not state that the purchase of beverages on February 17, 1965 was made personally from petitioner but stated that it was made from her premises (R. 116a). She was not operating the business on February 17, 1965 when the informant (fictional Charles Young?) allegedly made his buy of alcoholic beverages.

Nor was she present when the nine raiders arrived at her sister Maude's and her home on February 18, 1965. (Her sister Maude owned the premises.) Petitioner had not been at home for six weeks and did not

return home until two days after the raid. She was not present to be served or to have her "person" searched. Further, there is no proof anywhere, in the record of this case, that petitioner on February 17 or February 18, 1965 was directly or indirectly using the premises in violation of Kentucky law. To the contrary, there is clear proof that she was not so using the premises, and this is revealed by the, among others, fact that she was never arrested or charged with using the premises on February 18, 1965 for the possession for sale or the sale of alcoholic beverages in violation of Kentucky law.

Assuming *arguendo* a legal search warrant, if the search made by the troopers for beverages on February 18, 1965 were possibly legal, it was legal only against the petitioner's brother Tyree Davidson, who was then operating the business and because the troopers discovered alcoholic beverages in the kitchen when they first entered the house to serve the warrant on the petitioner. The search which resulted that day was therefore for beverages in Tyree Davidson's possession for sale, not petitioner. And, only he was charged and held guilty of a Kentucky law violation.

Therefore the question is—did not the search warrant, if legal when issued, become illegal and void when petitioner was found by the trooper not to be present and not using the premises illegally?

3. ASSUMING A VALID SEARCH WARRANT, DID TROOPER CROMER HAVE PROBABLE CAUSE TO BELIEVE THAT A FEDERAL CRIME HAD BEEN COMMITTED?

Assuming *arguendo* that the search was legal for alcoholic beverages, Trooper Cromer had a right to search the footlocker for alcoholic beverages. But, upon finding a large quantity of money in the footlocker and finding no alcoholic beverages, Trooper Cromer then realized and knew that he was legally finished under the search for beverages and that he had no probable cause to seize the money. Otherwise, he would not have telephoned the county attorney to tell him about finding a large quantity of money and requesting advice on seizure. The county attorney, on the basis that there was a lack of probable cause, advised the trooper to leave the money alone. Trooper Cromer's realization of no probable cause was then confirmed. The county attorney obviously realized that this was not the case of a search for alcoholic beverages and the discovery of an item which to own or possess—such as counterfeiting machine or heroin—which is a current, continuing violation of a criminal law committed in the presence of the searching officer.

In spite of the admonition and instruction of the county attorney that Trooper Cromer leave the money alone, Trooper Cromer telephoned the local Federal income tax revenue agent about the money—hopeful for authority from the agent to seize and carry away the money. The agent obviously did tell him that he

could not authorize him to seize and carry the money away—that is, that there was no probable cause. And it is clear that, by asking the revenue agent for authority, Trooper Cromer had abandoned all thought and belief that he had authority under the search warrant. He was no longer relying upon the warrant for seizure.

It is not exactly clear from the record whether or not the revenue agent authorized and deputized Trooper Cromer to seize the money long enough to count it. Either he did or he did not.

It is clear that Trooper Cromer advised the revenue agent that he intended to seize the money and count it, for Trooper Cromer testified that the agent requested to be advised the next day the results of the count (R. 131a, 285a).

It is clear that Trooper Cromer, after his telephone call with the revenue agent, announced to petitioner's brother (Tyree Davidson) that he was going to count the money for the Internal Revenue Service—that he was counting it for the Internal Revenue—and Trooper Cromer repeated this pronouncement (R. 324a, 360a). He did not announce or even pretend that he had authority under the search warrant or that be thought or believed that he had probable cause. For, he was acting under the guise of the Internal Revenue Service.

If the revenue agent did instruct Trooper Cromer to seize and count the money for him, then Trooper Cromer was solely an agent of the revenue agent. The agent would have had no right himself to go to the house and demand possession of the money to count it.

He would have needed a search warrant for the money. Therefore, he had no right to delegate such power.

If the revenue agent did not authorize and deputize Trooper Cromer to seize the money long enough to count it then, when his authority to count the money was questioned by petitioner's brother, Trooper Cromer deceitfully advised him that he was counting the money for the Internal Revenue Service.

Trooper Cromer's mere sight of a large quantity of money was not probable cause to believe that the petitioner was in violation of the criminal section of the Internal Revenue laws. *First,* the mere ownership of a large quantity of legal money or the possession of one's lifetime savings in a footlocker is not illegal under the Internal Revenue laws. *Second,* the amount of the money was unknown. *Third,* how could Trooper Cromer possibly look at the money and have probable cause to know or believe that petitioner had not reported correctly her income? He did not know and could not know the amount of income she had earned and reported in prior years, or how much she had saved from her prior earnings or how much she had inherited or what gifts she had and he did not know any of the vast array of other necessary facts and figures. *Fourth,* how could he possibly look at the money and have probable cause to know or believe that the petitioner had a willful intent to evade income taxes with respect to any of her income tax years?

Probable cause requires an appraisal of the facts and circumstances, a thinking process. There was none of that by Trooper Cromer at this state of the game.

To the contrary, for his own personal vendetta, Trooper Cromer illegally seized the money, searched it and (allegedly) counted it, simply hoping that somehow it would be evidence of a criminal violation of Internal Revenue laws, knowing full well that he had no probable cause.

Even if Trooper Cromer had a suspicion or belief of the commission of a crime, because of seeing the money, were there facts and circumstances within his knowledge to bring about a probable cause? *Nathanson* v. *U. S.*, 290 U. S. 41, 54 S. Ct. 11, 78 L. Ed. 159.

The question is did he have probable cause to believe from the facts and circumstances that a crime against the Internal Revenue Service was being committed by the mere ownership of a large quantity of money? (*U. S.* v. *Harris*, 91 S. Ct. 2075 (1971).)

Trooper Cromer made no report of the money to the County Judge who issued the search warrant (R. 127a, 129a, 130a, 292a). The alleged tally which Cromer made of the count was not delivered to the County Judge, nor was it sent to Kentucky state police headquarters as a part of Trooper Cromer's official report of the evidence but obviously the so-called tally went directly to the Internal Revenue Service.[2]

The instant case indeed has the characteristics of the case of *Gouled* v. *United States*, 255 U. S. 298, 65 L. Ed. 647, 41 S. Ct. Rep. 261, *where the obtaining through stealth,* by a representative of the government, from the office of one suspected of defrauding the

[2]The so-called tally was not introduced in evidence as a part of the official report to headquarters (R. 273a, 276a).

government, of a paper which had no pecuniary value in itself, but was only to be used as evidence against its owner, was held by this Court to be a violation of the Fourth Amendment. This Court there said—

> "While the contents of this paper are not given, it is impossible to see how the government could have such an interest in such a paper that, under the principles of law stated, it would have the right to take it into its possession to prevent injury to the public from its use. *The government could desire its possession only to use it as evidence against the defendant, and to search for and seize it for such purpose was unlawful.*" (Emphasis supplied.)

Therefore, the question is—do the facts here comply with the Federal standards for probable cause required by this Court in the case of *Carroll* v. *U. S.*, 267 U. S. 132, 162 (1925), as follows:

> "* * * The 'probable cause' required for the issuance of a search warrant, as the very term implies, involves probabilities. Probable cause exists where '*the facts and circumstances within (the officers) knowledge* and of which they have reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' a search should be conducted." (Emphasis supplied.)

Respondent states (p. 4) that "*Since the petitioner was not on the premises,* the counting was justified to safeguard against a possible claim that the officers had removed some of the money." No such hypothetical

justification was testified to by Trooper Cromer, who was the only trooper to testify for respondent.

Petitioner agrees with the logic of respondent when he indicates that, had petitioner been on the premises, her rights would have been violated by the seizure and count of the money. However petitioner can not agree that she loses these rights when the troopers strike at a time when she is absent. The instant case is not different from the case of *Amos* v. *United States,* 255 U. S. 313, 65 L. Ed. 654, 41 Sup. Ct. Rep. 266, in which this Court held that where concealed liquor was found by internal revenue agents, without a search warrant, in the home of the defendant, in his absence, and after a demand made upon his wife to search the premises for violation of the revenue law, the testimony was inadmissible as evidence against the defendant, because acquired by an unreasonable seizure under the Fourth and Fifth Amendments to the Constitution.

4. WAS THE RECORD DEVOID OF EVIDENTIARY SUPPORT FOR THE ACCURACY OF THE "BILL-BY-BILL" COUNT?

Petitioner disagrees with respondent's position (p. 4) that there was ample record support for the factual finding that the footlocker held $206,909 on February 18, 1965 and further disagrees that the Tax Court credited Trooper Cromer's testimony over the petitioner's. The Tax Court accepted petitioner's testimony concerning her lack of fraudulent intent, that she had $80,000 in 1944, that she had $100 inventory, and what she said about her living expenses.

The Tax Court had more than her word but Senator Brock and County Clerk Cornett, both of Harlan, testified that petitioner had a good reputation for truth and veracity (R. 143a, 182a). And State Senator Brock, a lawyer, was the county attorney who advised Trooper Cromer to leave the money alone.

The issue is primarily not the credibility of one witness as against another. The petitioner was not present at the alleged count to testify as to whether or not Troopers Lindsey and Mayberry counted "each individual bill." Although it appears highly improbable that Troopers Lindsey and Mayberry counted the money bill by bill. It is not altogether a question of whether Trooper Cromer saw what he saw (credibility), as indicated by respondent. For, petitioner does not dispute Trooper Cromer where he testified that he saw a large quantity of money and that he was present at the alleged count and that he was the tally man. The petitioner does not dispute Trooper Cromer where he testified on cross-examination (R. 297a):

> "Well, it gets tiresome counting one particular way all the time . . ."

And, petitioner does not dispute the credibility of Trooper Cromer when he admitted, on cross-examination (R. 298a):

> "Well, I think you can see the situation. Now, *I can't testify as to what they did.*" (Emphasis supplied.)

He was referring, of course, to Troopers Lindsey and Mayberry, the two (alleged) money counters, who

never did testify in the Tax Court trial. And, particularly, petitioner does not dispute the credibility of Trooper Cromer where he admitted, on cross-examination (R. 299a)—

> "Q. Mr. Cromer, can you swear that Mr. Mayberry was accurate in his count?
>
> A. Not completely accurate, no.
>
> Q. Can you swear Mr. Lindsey was accurate in his count?
>
> A. Not completely, no.
>
> Q. Can you swear the figures given by Mayberry and put down by you were correct?
>
> A. No, sir."

It can be seen, therefore, that the issue is primarily the "accuracy" of Troopers Lindsey and Mayberry, the alleged counters. And as to their accuracy of the count and the correctness of the total, the Tax Court therefore could only *assume* that it was accurate and correct because of the following: (1) Trooper Cromer testified that he could not swear to the accuracy or correctness of the counters; (2) There was no evidence of the expertise of the counters Troopers Lindsey and Mayberry in dealing with large sums of money; and (3) Troopers Lindsey and Mayberry, the so-called counters of the money and the only two who could have sworn to the inaccuracy and/or accuracy of the count, were not produced as witnesses by the respondent. And, the presumption must be from respondent's failure to produce these two key witnesses that their testimony would have been unfavorable to respondent. *Stoumen* v. *Commissioner* (C.A. 3) 208 F. 2d 903.

Without more, the Tax Court's decision can only be seen to erroneously take unwarranted judicial notice of a prodigious native ability of any two Kentucky state troopers to accurately count $206,909 (or $116,300) of assorted and mixed bills of small denominations, in under two hours. And primarily upon this does the government's $206,909 at February 18, 1965 lie. The Court further, with no evidence in the record as to the money gap (between December 31, 1963 and February 18, 1965) estimated that petitioner had $200,000 at December 31, 1963 which was the amount and date involved in the net worth.

5. RESPONDENT'S FACTUAL ERRORS.

The respondent erred (p. 2) in omitting the vital, key part of petitioner's objection of Trooper Cromer's testimony about the counting of the money, which omitted part was as follows (R. 267a):

> "Mr. Bagby: Your Honor, I object again to this line of questioning about counting this money. *This trooper went there to search for alcoholic beverages and now he says he is counting money.* I can't see that that was within his right, and *it was against the Constitutional rights of this Petitioner.*" (Emphasis supplied.)

In fact, petitioner objected when the money was first mentioned, as follows[3] (R. 265a):

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[3]See also R. 178a. And, although not before this Court, in the original transcript, petitioner advised in his opening statement that he objected and advised on two other occasions (Original Record; pp. 10, 21).

"Q. During the search was any money found on the premises?

Mr. Bagby: Objection.

The Court: Over-ruled."

Petitioner also objected to the introduction in evidence of the so-called tally of Trooper Cromer (R. 276a).

The respondent errs in stating that the Tax Court held deficiencies of income tax and additions thereto for the years 1945 through 1963 (p. 1). The Commissioner had determined fraud penalties, deficiencies in income taxes and other penalties for the years 1942 through 1963. However, the Tax Court held there was no fraud for any year and further held for the years 1942, 1943, 1944, 1955, 1956 and 1957 that there were no tax deficiencies or penalties and, further, for all the years 1955 through 1963 the Tax Court held no additions to the tax (R. 393a, 394a).

Respondent errs in stating that petitioner kept no records (p. 2). Petitioner used an accountant and kept records for many years, perhaps primitive and incomplete as was her education, and they were produced in the Tax Court but not introduced because the trial was based strictly on net worth, not on her records, and it was useless to burden the Court and record (R. 207, 208a).

CONCLUSION

For the reasons stated, this petition for writ of certiorari should be granted.

Respectfully submitted,

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September, 1971